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No. 95-1918
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

STATE OF ARKANSAS
Petitioner,
v.
FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA, et al.
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR *AMICI* STATES OF OHIO, ALASKA, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA IN SUPPORT OF PETITIONER

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STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and 27 other *amici* States write to urge the Court to reverse the decision of the United States Court of Appeals for the Eighth Circuit and to explain why the issues presented matter not just to Arkansas but to all of her sister States.

Either one of two questions could control the disposition of this case: (1) Does the Tax Injunction Act bar this challenge to State taxes from being entertained in district court? and (2) Has Congress granted production credit associations immunity from State sales and income taxes? The answers to both questions implicate vital issues of federalism and State sovereignty.

The Tax Injunction Act protects two essential attributes of State sovereignty -- the power to tax and the power to determine how, when, and where States defend challenges to their taxes. The Act thus "embodie[s] Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts." *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 515 n.19 (1981). In this instance, by claiming that any lending institution labeled a federal instrumentality may sue in federal court, respondents seek to create a significant exception to the Act's cardinal policy of noninterference with State taxes. The *amici* States wish to prevent this dilution of the Act.

The immunity questions raised by respondents also have far-reaching consequences to the States. The decision below releases respondents from income and sales tax obligations that most other corporate citizens (including most other banks) pay for the privilege of doing business in Arkansas. But the real cost of the Eighth Circuit's ruling cannot be measured just by Arkansas' loss of revenue from all Production Credit Associations ("PCAs") per year, or by

the cost to the other States from this loss of revenue. A more accurate dollars-and-cents assessment must account for the potential loss of revenue from other entities within the Farm Credit System.

Ohio, to use one example, is currently defending a similar action in federal court filed by an "agricultural credit association" ("ACA"), an entity that constitutes a merger of one PCA and two federal land bank associations. Other *amici* States face similar claims by lending institutions chartered within the Farm Credit System in the wake of the decision below. Making matters worse is the fact that, until recently, all jurisdictions agreed that PCAs were subject to most State taxes unless the federal government owned shares in the PCA (which is not true here). *See, e.g., Baker Production Credit Ass'n v. State Tax Comm'n*, 421 P.2d 984 (Ore. 1966); *Woodland Production Credit Ass'n v. Franchise Tax Bd.*, 225 Cal. App.2d 293, 37 Cal. Rptr. 231 (1964); *Columbus Production Credit Ass'n v. Bowers*, 180 N.E.2d 1 (Ohio), *cert. denied*, 371 U.S. 826 (1962).

SUMMARY OF ARGUMENT

1. The lower federal courts should not have entertained this challenge to the Arkansas sales and income tax. Under the Tax Injunction Act, 28 U.S.C. 1341, States cannot be haled into federal court against their will in actions seeking to enjoin the collection of taxes. The bar is absolute and jurisdictional in nature. It reflects a broad congressional policy of federal noninterference with one of the most basic responsibilities of a sovereign State -- to raise revenue for the public welfare. *California v . Grace Brethren Church*, 457 U.S. 393, 410-11 (1982). In view of the vital nature of this State responsibility, underlying comity concerns and the pre-existing requirement of a "plain, speedy and efficient remedy" in State court, exceptions to the Act receive a

narrow construction. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 524 (1981)(noting that the Act's "broad, prophylactic language" precluded "expansive exception"). Accordingly, clear congressional direction is needed to obtain an exemption from the Act.

a. No congressional direction, clear or otherwise, exists here to exempt federal instrumentalities from the Act. The most that can be said is that respondents are "federally chartered instrumentalities." Yet no holding of this Court (or even of the lower courts that have addressed the issue) establishes that such labeling by itself suffices to overcome the Tax Injunction Act's lofty jurisdictional bar.

Nor does the United States' authority to bring such actions change things. Under *Department of Employment v. United States*, 385 U.S. 355, 358 (1966), it is true, "suits by the United States to protect itself and its instrumentalities from unconstitutional exaction" do not violate Tax Injunction Act. But in this instance the United States has not joined the action "to protect . . . its instrumentalities." On the contrary, it has entered the case to say that the PCAs *do not* have authority under the Tax Injunction Act to bring their own state-tax challenges in federal court. What is more, the availability of the United States to join an action to protect important federal interests, as well as the authority of Congress clearly to grant a Tax Injunction Act exemption to some or all federal instrumentalities when it sees fit, are precisely the kinds of safety valves that makes the States' interpretation fair, legitimate and workable.

Far less workable (and no more fair) is the suggestion that the Court should engage in an importance-to-the-federal-government inquiry in determining whether a given instrumentality may overcome the jurisdictional bar of the Act. As an initial matter, this inquiry has little relevance to

PCAs. These Depression-era lending institutions are no longer owned in any way by the federal government and are akin in every relevant respect to other private lending institutions and banks. Under any assessment of governmental importance, it is difficult to see how PCAs could meet the test. But, more importantly, the test itself is not workable. No clear lines exist and none are likely to emerge under such an elusive inquiry.

b. The Court should reject respondents' interpretation of the Act for a second reason: It will avoid another jurisdictional problem, one that is constitutional in nature. Under the Eleventh Amendment, States may not be subjected to federal court actions against their will. While *Ex Parte Young*, 209 U.S. 123 (1908), creates an exception to this rule for injunctive actions, the exception does not apply to injunctive actions filed directly against the State itself, *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Here, respondents have named only the State of Arkansas as a defendant, not State officials acting in their official capacity. Nor does respondents' status as "federally chartered instrumentalities" solve this problem. Such entities do not receive the benefits of the United States' exemption from the Eleventh Amendment. *See Smith v. Reeves*, 178 U.S. 436, 445-46 (1900).

2. Even if the lower federal courts properly had jurisdiction over this claim, they erred in assessing the claim on the merits. PCAs simply are not immune from State sales and incomes taxes.

From their inception in 1933, PCAs received an exemption from such State taxes as sales and income tax, but only if the federal government held stock in the PCA. Thus, if the federal government held stock, the PCA was exempt. Otherwise, it was not. In recent times, this narrow

exemption became meaningless because the federal government no longer held stock in any of the PCAs. Responding to this development, Congress eliminated the exemption in 1985 in a series of technical amendments to the statute. Under current law, then, Congress provides no exemption to PCAs from State sales and income tax. Instead, it simply continues to provide a long-held State and federal tax exemption from taxation on the principal and interest of "notes, debentures, and other obligations issued" by PCAs. 12 U.S.C. 2077.

This chronology of amendments can lead to only one plausible conclusion: PCAs previously had an exemption from State sales and income taxation if the federal government owned shares in the lending institution; the exemption became archaic; Congress eliminated the exemption; PCAs themselves no longer enjoy any exemption from State sales and income tax. A contrary view requires too many inferential leaps, and leaves too many questions unanswered. But even ignoring this sequence of events, there is another problem with respondents' argument. A focus on the current statutory exemption simply does not support the argument that Congress exempted PCAs from State sales and incomes taxes. How can a narrow exemption for "notes, debentures, and other obligations issued by" PCAs plausibly extend to sales and income taxes imposed on the PCAs themselves? Such language does not begin to immunize PCAs from these customary costs of doing business, let alone do so clearly.

ARGUMENT

I. THE TAX INJUNCTION ACT PROHIBITS FEDERALLY CHARTERED LENDING INSTITUTIONS FROM CHALLENGING STATE TAXES IN FEDERAL COURT.

A. The Tax Injunction Act Bars This Claim.

On its face, the Tax Injunction Act creates an absolute jurisdictional bar to this action:

> The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. 1341. "[P]redicated upon the desirability of freeing, from interference by the federal courts, state procedures" for collecting taxes, *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Act bars federal court actions to obtain injunctive and declaratory relief from state taxes, *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). The legislation reflects a broad congressional policy of federal noninterference with one of the most basic attributes of State sovereignty -- to raise revenue for the public welfare. *Grace Brethren*, 457 U.S. at 410-11. *See Tully v. Griffin, Inc.*, 429 U.S. 268, 73 (1976) (the Act is rooted in "the imperative need of a State to administer its own fiscal operations").

In this instance, the text of the Act itself would seem to answer the question presented. Because respondents do not challenge the availability of a "plain, speedy and efficient remedy" in the Arkansas state courts, the statute by its terms

bars the action.

In light of the overriding dictates of the Supremacy clause, however, the Court has engrafted a narrow exception onto the Act for actions brought by the United States. Section 1341 thus "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment v. United States*, 385 U.S. 355, 358 (1966). While this exception would permit the United States to bring an action on behalf of respondents to protect an interest of the United States, it by no means permits federal instrumentalities to bring such actions on their own. Add to this the fact that exceptions to the Tax Injunction Act must be narrowly construed because of the absolute, "prophylactic" language of the statute, *Rosewell*, 450 U.S. at 524, and it becomes clear that respondents cannot rely on the United States' exemption in this instance.

Nor does *Department of Employment* itself advance respondents' argument. All it establishes is that the United States may sue to enjoin State taxation, not that federally chartered corporations may do so themselves. Indeed, the language of the Court's holding -- that Section 1341 "does not act as a restriction upon suits by the United States to protect itself and its instrumentalities," 385 U.S. at 358 -- seems to embrace the States' position. The answer to a federal instrumentality's dissatisfaction with a local tax, the decision suggests, is not to sue on its own behalf in federal court. Rather, the answer is to convince the United States to file the claim itself; or, failing that, to bring the claim in state court.

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), is no more helpful to respondents. At issue was whether certain Indian tribes could enjoin State taxation in

federal court under 28 U.S.C. 1362. The statute granted the district courts "jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Even though Section 1362 plainly expanded jurisdiction for Indian tribe actions beyond that already contemplated by the general federal question statute, *Moe* was reluctant to infer an exception from the across-the-board bar of the Tax Injunction Act. "[T]he mere fact that a jurisdictional statute such as sec. 1362 speaks in general terms of 'all' enumerated civil actions does not itself signify that Indian tribes are exempted from the provisions of sec. 1341." *Id.* at 472. Still, the Court found for the tribes on the ground that the statutory text, along with other tools of statutory construction, showed that Congress meant the tribes to have the same power that the United States had traditionally exercised as trustee to assert their rights in federal court. *Moe* thus concluded that Section 1362 brought the tribes within the United States' own exemption under *Department of Employment*. *Id.* at 473.

Far from helping respondents, *Moe's* narrow holding demonstrates the kind of clear legislative direction Congress must give in exempting entities from the Tax Injunction Act. Such direction, clear or otherwise, simply does not exist here. To begin with, no existing legislation confers special federal court jurisdiction over matters involving federal instrumentalities. Unlike *Moe*, a barren legislative landscape greets those looking for congressional direction that federal instrumentalities should be entitled to a special exemption from the broad terms of the Tax Injunction Act. On that basis alone, in view of the clear prohibition of the Act, respondents' argument should be rejected.

But even if one searches further, little else exists to

sustain such an exemption. All one sees are three references to the PCAs' status as "federal instrumentalities". The Agricultural Credit Act of 1987 refers to PCA "instrumentality" status in these discrete ways:

* "Each production credit association shall continue as a Federally chartered instrumentality of the United States." 12 U.S.C. 2071(a):

* "On approval of the proposed articles ... the [production credit] association shall become as of such date a federally chartered body and instrumentality of the United States." 12 U.S.C. 2071(b)(7).

* "Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation ... imposed by the United States or any State" 12 U.S.C. 2077.

Respondents contend, as they must, that these isolated references illustrate Congress's determination to grant the same Tax Injunction Act exemption to PCAs that the United States now enjoys. That is wrong. None of the references mentions federal jurisdiction, as in *Moe*, and none begins to establish an exemption with the kind of clear language that the Court has required. On this record, respondents' argument ultimately boils down to the sweeping proposition that "instrumentality" status by itself warrants the conclusion that Congress meant to permit a Tax Injunction Act waiver. While the decision to call PCAs federal "instrumentalities"

is not an insignificant factor, such labeling has never been enough to overcome the absolute jurisdictional bar established by the Tax Injunction Act.

Moreover, the availability of the United States to join an action to protect important federal interests, as well as the authority of Congress clearly to grant Tax Injunction Act exemptions to federal instrumentalities when it sees fit, are precisely the kinds of safety valves that makes the States' interpretation fair, legitimate and workable. *Housing Authority of Seattle v. State of Washington Dep't of Revenue*, 629 F.2d 1307, 1311 (9th Cir. 1980) ("We agree that [joinder of the United States] is necessary before a federal instrumentality can overcome the restriction of the [Tax Injunction Act]."). Far less workable (and no more fair) is the suggestion that the Court should engage in an importance-to-the-federal-government inquiry in determining whether a given instrumentality may overcome the jurisdictional bar of the Act. The test just is not workable. No clear lines exist and none is likely to emerge under such an elusive inquiry. *See, e.g.*, *Simon v. Cebrick*, 53 F.3d 17, 22-23 (3d Cir. 1995) (finding that FDIC was exercising a sufficient governmental role to enjoy the exception to the Tax Injunction Act); *Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600 (1st Cir. 1993) (denying exemption to FDIC under functional approach); *FDIC v. State of New York*, 928 F.2d 56, 59 (2d Cir. 1991) (denying exemption to FDIC under functional approach because it was serving primarily private commercial interests in its function of assisting, or serving as receiver of, private banks); *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 613 (5th Cir. 1991) (finding exemption for FDIC in construing its jurisdictional statutes); *Federal Reserve Bank of Boston v. Commissioner of C & T*, 499 F.2d 60 (1st Cir. 1974) (permitting suits by instrumentalities that can be viewed as "arms of the government," which included the Federal

Reserve Bank of Boston); *United States v. State Tax Comm'n*, 481 F.2d 963 (1st Cir. 1973) (permitting suits by instrumentalities that can be viewed as "arms of the government," which did not include federal savings & loan associations).

No doubt the rule we advance does run up against one possibility that at first blush seems counter-intuitive -- that the Federal Reserve Bank could not of its own volition sue in federal court. *See Federal Reserve Bank*, 499 F.2d 60. However, the requirement that exceptions to the Tax Injunction Act be clearly provided, the availability of assistance from the United States when the matter is urgent, and the ever-present possibility of a permanent congressional exemption seem to be the best answers to this possibility. This approach accords with the historical requirement that Congress specifically provide for federal jurisdiction over actions involving federally chartered instrumentalities. *Compare Bank of the United States v. DeVeaux*, 9 U.S. (5 Cranch) 61 (1809) *with Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

At any rate, even if the Court were to adopt one of the functional tests employed by the lower courts, respondents would still come up short. The federal government has not held had any ownership interest in the PCAs since 1968. Today, these Depression-era creations thus bear far more resemblance to run-of-the-mill banks than they do to any arms of the government. In fact, Congress has expressly denied district court jurisdiction premised solely upon the existence of a federal charter, unless the federal government owns at least fifty percent of the shares of the corporation. *See* 28 U.S.C. 1349 ("The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is

owner of more than one-half of its capital stock.").

Finally, the reach of respondents' contrary argument is illustrated by the fate it would have met prior to 1937, before the Tax Injunction Act was even passed. Though lacking legislation to limit State tax challenges filed in federal court, the courts usually denied requests for injunctive relief on equitable grounds, namely the failure to establish irreparable harm or the failure to show the unavailability of an adequate remedy at law. The federal courts saw in the adequate-remedy element a vehicle for effectuating comity between federal and state courts and avoiding excessive interference with the fiscal operation of State and local government. *Dows v. City of Chicago*, 78 U.S. 108 (1871); *Matthews v. Rodgers*, 284 U.S. 521, 525-26 (1932). Indeed, prior to 1937, the Eighth Circuit rejected an attempt to file a State tax challenge in federal court that in many respects parallels this one. *See Hammerstrom v. Toy Nat. Bank of Sioux City*, 81 F.2d 628, 636 (8th Cir.) (rejecting attempt by two national banks and one joint-stock land bank to recover State taxes), *cert. denied*, 299 U.S. 546 (1936). It would be ironic if the Tax Injunction Act provided less protection to State tax administration than *before* the Act was passed.

B. Respondents' Interpretation Of The Act Implicates A Constitutional Question Of Eleventh Amendment Immunity.

A contrary interpretation also raises another problem. If the Court concludes that federal instrumentalities enjoy the same exemption from the Tax Injunction Act that the United States enjoys, another jurisdictional question arises, which is constitutional in nature. Under the Eleventh Amendment, States may not be subjected to federal court actions against their will. While *Ex Parte Young*, 209 U.S. 123 (1908)

creates an exception to this rule for injunctive actions, the exception does not apply to injunctive actions filed against the State *itself, see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (requiring dismissal of State and State agency from injunctive relief against State officials). Notably, respondents have named only the State of Arkansas as a defendant, not State officials acting in their official capacity. Nor can respondents maintain that "federally chartered instrumentalities" receive the benefits of the United States' exemption from the Eleventh Amendment. The Court has already rejected that position. *See Smith v. Reeves*, 178 U.S. 436, 445-46 (1900) (holding that federally-chartered corporations are subject to Eleventh Amendment restrictions).

The Court, however, may avoid this constitutional problem. The issue disappears under either of two interpretations -- that federal instrumentalities do not enjoy the same exemption from the Tax Injunction Act that the United States enjoys (save when the United States enters the case), or that PCAs generally do not enjoy this exemption. *See Gomez v. United States*, 490 U.S. 858, 864 (1989)("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); *Jean v. Nelson*, 472 U.S. 846, 856-57 (1985). Either way, jurisdiction to entertain this claim in federal court simply does not exist on this record.

II. CONGRESS HAS NOT GRANTED PRODUCTION CREDIT ASSOCIATIONS IMMUNITY FROM STATE SALES AND INCOME TAX.

Even if the Court concludes that the Tax Injunction

Act does not apply here and even if it concludes that the Eleventh Amendment does not separately deprive the lower federal courts of jurisdiction to entertain this action, respondents face another obstacle: They are wrong on the merits. Congress has not immunized PCAs from State sales and income taxes.

As a starting point, the act of immunizing a business from state taxation represents an extraordinary exercise of federal power. It limits one of the most essential attributes of a sovereign. The power to tax, this Court has emphasized, is "the most basic power of government." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). The Court thus has been careful narrowly to construe such exemptions and, what would seem to come to the same end, to require that such exemptions be clearly provided. *See, e.g., Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 191 (1987) ("court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly established"); *Smith v. Davis*, 323 U.S. 111, 119 (1944) (requiring "a clear indication of an intent to immunize from state taxation"); *Graves v. People of the State of New York*, 306 U.S. 466, 483 (1937) (such immunity should "be narrowly restricted").

In this instance, Congress has neither clearly nor impliedly immunized PCAs from State taxation. Prior to 1985, Congress provided the following exemptions to the credit associations:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except

> surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. ***Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.***

Farm Credit Act of 1971, Pub. L. 92-181, sec. 2.17, 1971 U.S.C.C.A.N. 678 (formerly codified at 12 U.S.C. 2098). This language, which is drawn from the 1971 statute, varies in form but not substance from the language of the original 1933 statutes. *See* Pub. L. 73-98, sec. 63, 48 Stat. at 276 (1933).

Thus, from 1933 through 1985, Congress provided two essential exemptions: One for bond interest and principal; the other for most other taxes (including sales and income tax) so long as the PCA was owned in part by the federal government. By 1968, however, the latter exemption

had become obsolete. "[A]ll PCAs were owned entirely by their borrower members." Pet. App. at A-10, 76 F.3d at 966.

Recognizing this development, Congress deleted the sales and income tax exemption in the Farm Credit Amendments of 1985. Under current law (and the law applicable to this case), the exemption provision reads as follows:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority.

12 U.S.C. 2077.

The removal of the exemption thus eliminates the availability of any sales and income tax exemption for the PCAs -- as distinguished from exemptions for their bonds and other interest-bearing instruments, which continue. To read the amendment any other way is to conclude that Congress used the removal of a narrow immunity exemption somehow to create a gaping immunity exemption. Under any principle of statutory construction -- clear statement or otherwise -- that makes little sense. Nor can the remaining exemption for bond interest and principal be stretched to cover an exemption from State sales and income taxes impose on the PCAs themselves. Pet. App. at A-11; 76 F.3d at 967 (Loker, J. dissenting) (noting that the majority

"has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption, for which no PCA remained eligible, as the grant of a far broader implied exemption.")

Confirming this interpretation is Congress's creation of tax immunities elsewhere in the United States Code for other members of the Farm Credit System. PCAs, like other members of the Farm Credit System, are covered by the Agricultural Credit Act of 1987. Throughout that legislation, Congress specifies for each entity the scope of immunities it intends to confer. See e.g., 12 U.S.C. 2023 (broad exemption for Farm Credit Banks); 12 U.S.C. 2098 (broad immunity for federal land bank associations); 12 U.S.C. 2134 (narrow immunity for banks for cooperatives). Ordinary principles of statutory construction give content to Congress's decision to omit language in one portion of an enactment that is included in other provisions of the same enactment. *See City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994), ["It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (citations omitted). Accordingly, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) (internal quotations omitted).

Under these circumstances, the only conceivable justification for respondents' interpretation is to resurrect the view that the courts have authority to imply such immunities directly under the Supremacy Clause, even when Congress

has refused to do so itself. The precedent for judicially implying immunity, *see M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), has given way to following Congress's own immunity provisions because Congress regularly provides for the scope of immunity by statute -- something it did not do when it chartered the Second Bank of the United States in the early nineteenth century.

That the Court is reluctant judicially to imply immunity directly under the Supremacy Clause is reflected in several more recent cases. For example, in *Graves v. People of State of New York*, 306 U.S. 466 (1937), the Court declined to extend tax immunity to the income of employees of the Home Owners' Loan Corporation absent express exemption by Congress. Like the present case, Congress expressly exempted the Corporation's bonds from taxation. Rejecting the claim of a broader implied immunity, the Court noted:

> [T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed.

306 U.S. at 483. *See also First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339 (1968).

The history of the Farm Credit System, moreover, shows that Congress always has specified the immunities it intended. The Farm Credit System immunity cases thus all turn on statutory interpretation. *See, e.g., Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941)(applying "federal instrumentality" concept as basis for Congress' power to immunize by statute); *Federal Land Bank of Wichita v. Bd. of County Commissioners*, 368 U.S. 146 (1961). Indeed, *Bismarck Lumber* teaches that Congress has broad power to immunize federally chartered "instrumentalities" when it sees fit to do so -- not that "instrumentality" status by itself requires that judges should imply immunity directly under the Supremacy Clause. *See also United States v. Detroit*, 355 U.S. 466, 474 (1958) ("Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve."); *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 191 (1987) ("[O]ur job is neither to assess the underlying merits of the program, nor to opine on whether Congress would be wise to exempt Ginnie Maes from state taxation. ... A court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly established."); *Smith v. Davis*, 323 U.S. 111, 119 (1944) ("All of these related statutes are a clear indication of an intent to immunize from state taxation only the interest-bearing obligations of the United States which are needed to secure credit to carry on the necessary functions of government. That intent, which is largely codified in sec. 3701, should not be expanded or modified in any degree by the judiciary.").

In the end, principles of statutory construction have replaced principles of constitutional analysis in determining tax immunity. The Court thus has declined to extend tax

immunity or other forms of pre-emption under the Supremacy Clause any further than Congress itself provides. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) (rejecting Indian tribe's argument that its off-reservation resort business should be exempt from state taxation) ("Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation."); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

Just as Congress defined the effect of the Supremacy Clause upon the legislation at issue in *Mescalero Tribe* and *Cipollone*, so too it has defined the scope of PCA immunity here. No reason exists to reconsider the immunities that Congress could have created but decided not to provide. *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75-76 (1993); *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 11-13 (1986). Yet this is precisely what the Eighth Circuit's interpretation of the "federal instrumentality" doctrine would do. This view should be rejected.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request the Court to reverse the lower-court decision.

Respectfully submitted,

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